a matter of law. It is said, however, that obtaining a judgment is a conclusive election, as a matter of law; but the leading English case on the subject appears to have involved no question of election at all, *Priestly* v. *Fernie,* supra, for there is nothing in the case to show that plaintiff knew of the existence of a principal until after judgment was obtained. Under such circumstances, he clearly could have exercised no election, but despite this fact, the judgment against the agent was held to close the matter. See also *Kendall* v. *Hamilton* (1879) 4 App. C. 504. The real basis of the decision seems to be that the judgment merges the cause of action, and is itself a satisfaction, just as the English courts hold it to be in the case of a judgment against one of several joint tort feasors.

If, now, we turn to those cases in which satisfaction and not the mere judgment is the essential thing, it seems also that the question of election does not enter. When a third party, with a full knowledge of all the facts, obtains a judgment against the agent, he has surely by his acts given as much expression to his intention to elect as seems ordinarily possible, and if, therefore, despite this, he is allowed to sue the principal unless he gets satisfaction, it would seem to be so, not because he has not "elected," in any reasonable meaning of that term, but because he need not, since he has a right against both the principal and the agent, which nothing short of satisfaction will destroy. It would seem that this is the real ground for the decisions in the latter class of cases, nor does any serious objection to this view appear. Since the principal receives the benefit of the transaction, there is no cause for not holding him liable. The third party should have the right to pursue not the principal or the agent—which is another way of saying he must elect —but both of them, until his claim is satisfied. Some cases have indeed allowed an action to be brought against them jointly. See *Tew* v. *Wolfsohn* (1902) 76 N. Y. Supp. 919. Any difficulties of procedure, then, that might be involved, ought to disappear under modern procedural methods. All election can mean in such cases —if it means anything at all—is that plaintiff cannot get payment of his claim from both the principal and the agent, but must be said to decide to take payment from the one only from whom in fact he has received it. See *Am. Trading Co.* v. *Wilson Sons & Co.* (1902) 74 N. Y. Supp. 718. See also *McLean* v. *Sexton* (1899) 44 App. Div. 520.

Liability of a Grantee Who Takes Land Subject to Incumbrances.—When a grantee takes land "subject to a mortgage" it is generally said that he thereby becomes bound by the mortgage and cannot thereafter attack its validity. Jones on Mortgages § 1491 et seq. This result appears to be reached by the courts with great uniformity and irrespective of the character of the defense set up by such grantee. *Fuller & Co.* v. *Hunt* (1878) 48 Ia. 163; *West* v. *Miller* (1890) 125 Ind. 70. In a recent case in Tennessee the point has again come up for decision and the orthodox result was reached. Certain land had been subject to a mort-

gage for thirteen years when the mortgagor's executor transferred it to the defendants, subject to the mortgage. By Chapter 9 of the Laws of 1885 it is declared that the lien of a mortgage shall be discharged in ten years from the maturity of the debt secured. The defendants sought to take advantage of the statute but the court held that they were estopped by accepting the deed and that the mortgage lien would not be barred until another ten years. *Christian* v. *John* et al. (Tenn. 1903) 76 S. W. 906.

The Tennessee statute as interpreted does not merely give a defense to the mortgagor, it absolutely destroys the lien of the mortgage. *Bank* v. *Smith* (1901) 107 Tenn. 476. The court in the principal case recognizes that such is the effect of the statute but it nevertheless holds the defendants bound. That is to say the court makes no distinction, as respects the obligation of the grantee, between a void or non-existent mortgage and a mortgage that is voidable at the option of the mortgagor. And it would seem that such a distinction should be made. If the mortgage is merely voidable, if there is some personal defense which the mortgagor may or may not interpose, it would seem correct to hold that a grantee who takes property subject to such a mortgage should not be allowed to attack its validity, for a mortgage although voidable is nevertheless a mortgage and an enforceable mortgage unless and until the original mortgagor interposes the defense to which he alone is entitled. And such is the universal holding *Moulton* v. *Haskell* (1892) 50 Minn. 367.

But when, as in the principal case, the mortgage in question is not voidable merely but absolutely void, i. e. no mortgage at all, it would seem that a different result should be reached. A case in Connecticut, *Goodman* v. *Randall* (1877) 44 Conn. 321, though apparently against the weight of authority, Jones on Mortgages § 744 note, appears to take the sound view. In that case the mortgage was not signed by the mortgagor, and in a suit against the grantee of the mortgagor, who took subject to the mortgage, it was held that he could interpose as a defense the fact that the mortgage had not been signed. The court there said, "a grantee, by accepting a deed which describes the premises as subject to an incumbrance, is not estopped from claiming that the incumbrance has no existence in fact."

If a mortgage is void and there is no reason for finding an equitable mortgage, it is, so far as the law is concerned, non-existent and there is by force of it no lien upon the land. Such being the case it is difficult to find any justification for the holding that such a mortgage becomes a valid and subsisting lien upon the premises merely because the grantee of the premises said that it was a lien, especially since there appears no good reason for finding an estoppel in favor of the mortgagee. There is no magic in words sufficiently potent to change a void mortgage into a good mortgage and it would seem better to allow a grantee to show that the mortgage which he purported to assume was void i. e. that there was no mortgage which he could assume.